# Ethics Opinion 288

# Compliance with Subpoena from Congressional Subcommittee to Produce Lawyer's Files Containing Client Confidences or Secrets

In response to a Congressional subcommittee's subpoena for a lawyer's files pertaining to the representation of a current or former client and containing confidences or secrets that the client does not wish to disclose, the lawyer has a professional responsibility to seek to quash or limit the subpoena on all available, legitimate grounds to protect confidential documents and client secrets. If, thereafter, the Congressional subcommittee overrules these objections, orders production of the documents and threatens to hold the lawyer in contempt absent compliance with the subpoena, then, in the absence of a judicial order forbidding the production, the lawyer is permitted, but not required, by the D.C. Rules of Professional Conduct to produce the subpoenaed documents. A directive of a Congressional subcommittee accompanied by a threat of fines and imprisonment pursuant to federal criminal law satisfies the standard of "required by law" as that phrase is used in D.C. Rule of Professional Conduct 1.6(d)(2)(A).

**Applicable Rule**

- Rule 1.6(d)(2)(A) (Confidentiality of Information)

**Inquiry**

The inquirer, a managing partner of a law firm in the District of Columbia, requests an opinion regarding the propriety of his compliance with a Congressional subcommittee subpoena duces tecum for the firm's files and records relating to its representation of a client.[1] The inquirer seeks

to know how far he and the firm must go to meet their obligations to protect the client's confidences under the D.C. Rules of Professional Conduct. Implicitly, he raises the question of whether a lawyer must stand in contempt of a subcommittee and face the prospect of a criminal conviction, imprisonment and fines in order to vindicate the client's interest in confidentiality.

The Congressional subcommittee issued a subpoena duces tecum requiring the firm to produce "all records that relate to the services, efforts, lobbying or other work undertaken or provided, or to be undertaken or provided" to one of the firm's clients. The subpoena also demanded all records relating to the fees the firm charged that client, "including but not limited to all records that relate to the nature, negotiation, agreement, billing, payment, structure, purpose or allocation of such fee."

The law firm and the client maintain that the subpoenaed documents contain client confidences and secrets. The law firm filed written objections to the request and advised the client of the subpoena. The subcommittee overruled the objections and demanded compliance with the subpoena. When threatened by the chairman with contempt of Congress and possible criminal prosecution and sanctions, the subpoenaed partner produced the documents, despite protests and a threat of suit by the client.

Even though this particular matter has been concluded, we address the ethical issues arising from these facts because of the disturbing increase in incidences of Congressional subpoenas being sent to lawyers in their professional capacity seeking information relating to the activities of their clients and legal services provided to them.

Relying on prior interpretations of the D.C. Rules of Professional Conduct and its predecessor, the Code of Professional Responsibility, in the analogous area of compliance with judicial and administrative subpoenas to lawyers for confidential client information, we conclude that a lawyer has an obligation to make all appropriate objections to the Congressional subpoena. We also suggest that the lawyer may be well advised to discuss with the client the opportunities and prospects of seeking a court order to prevent disclosure. Thereafter, if the subcommittee overrules the objections, orders the documents be produced and threatens to hold the lawyer in contempt for failure to comply, and if no judicial intervention is obtained by the client, then, we conclude, the lawyer may comply with the directive as if it were a court order to comply with a subpoena after all appeals have been exhausted.

## Discussion

1. **A Lawyer May Disclose Client Confidences or Secrets Against the Client's Will When Required by Law or Court Order**

Under Rule 1.6(d)(2)(A) of the District of Columbia Rules of Professional Conduct ("Rules" or "Rule"), a lawyer may reveal a client confidence or secrets only when expressly permitted by these rules or when "required by law or court order." *See* Rule 1.6, Cmt. [10]. Client confidences are protected by state and federal law as set forth in the governing attorney-client privilege and the work-product doctrine as well as by the ethical constraints on lawyers imposed by the D.C. Rules on confidentiality. *See* Rule 1.6, Cmt. [5]. The rules and the comments reflect the critical importance that preserving client confidences and secrets has to the attorney-client relationship and to the ability of the client to receive effective legal advice and representation. Accordingly, the comments to the Rules recognize that the doctrines of privilege and confidentiality "apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client." *Id.* They also recognize that the rule applies to "all information gained in the course of the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing or would… likely… be detrimental to the client…" *See* Rule 1.6, Cmt. [6].

Thus, the ethical obligation of the lawyer to take all necessary steps to protect client information is broader than the confines of the attorney-client privilege or the work product doctrine. As stated by a leading legal ethicist, "[e]xtending a reach that includes all of those protections—and encompassing much of what they omit—is the professional regulation requiring a lawyer to keep a vast array of client information confidential and not to use it against the interests of the client. We will call that obligation the principle of confidentiality." Wolfram, *Modern Legal Ethics* § 6.7.1, at 296 (Practitioner's ed. 1986). Echoing the language in our own commentary, Professor Wolfram states that this principle of confidentiality applies in all contexts, including legislative hearings. *Id.* § 6.3, at 255. We agree and believe that a lawyer's obligations to protect client confidences in the Congressional context are the same as those in the judicial or administrative context.

This Committee has repeatedly addressed the lawyer's obligations to maintain the client's confidences and secrets in judicial and administrative proceedings. *See, e.g.,* D.C. Bar Ops. 214, 180, 124, 99 and 14. These opinions essentially hold that a lawyer has an ethical obligation to

raise all available, legitimate objections to a judicial or administrative subpoena for protected information and, as reflected in Comment [26] to Rule 1.6, either to make "every reasonable effort" to appeal an order demanding compliance with a subpoena or at least to notify the client of the order and provide the client every opportunity to challenge it. On the other hand, our opinions and all of the other authorities we can identify bearing on the question suggest that a lawyer is not required to stand in contempt of a court order and risk criminal prosecution in order to protect the subpoenaed information.

For example, in D.C. Bar Opinion 83, we stated that a lawyer "is not obliged to run the risk of being held  contempt of court because of the client's desire that confidences and secrets not be disclosed." Similarly, in D.C. Bar Opinion 14, we stated that "the attorney is . . . free to comply with whatever directive the trial court gives." In D.C. Bar Opinion 214, we stated "we conclude that the law firm . . . may comply with a final judicial order enforcing an IRS summons without seeking appellate review of that order, but only after giving its client notice of the court's order and a reasonable opportunity to seek review independently of the firm."

The American Bar Association's Committee on Ethics and Professional Responsibility similarly has concluded that if a lawyer's efforts to seek to limit a subpoena to protect client confidences or secrets are "unsuccessful, either in the trial court or in the appellate court (in those jurisdictions where an interlocutory appeal on this issue is permitted), and she is specifically ordered by the court to turn over [the subpoenaed files]," then the lawyer may do so consistently with the Model Rule of Professional Conduct 1.6. ABA Formal Op. 94-385 (1994). The American Law Institute's Restatement (Third) of the Law Governing Lawyers: Confidential Client Information § 115 (Proposed Final Draft No. 1, 1996)[2] also concludes that in such a situation the lawyer may "but is generally not required" to be held in contempt to protect such information.

While there are obvious similarities in the procedures available in the judicial and legislative contexts to register and argue objections to subpoenas, there are two important differences. First, there is no recognized available appellate procedure in the legislative process as there is in the judicial system. As we understand the Congressional procedures and the judicial enforcement of the federal criminal contempt statute, as set forth below, once a witness is found in contempt by a Congressional body, there is no appeal permitted and the offending conduct may not be cured by a later disclosure.[3] If a witness refuses to comply with a Congressional subpoena, any mistake of law, including, reliance on the good faith but mistaken advice of counsel, is not a defense in a later criminal prosecution for contempt of Congress. *See, e.g., Yellin*

*v. United States*, 374 U.S. 109, 123 (1963). Second, due to the Speech or Debate Clause of the Constitution, the federal courts, in general, will not enjoin members of Congress or their staffs from issuing or attempting to enforce a Congressional subpoena that is "within the sphere of legitimate legislative activity." *See Eastland v. United States Serviceman's Fund*, 421 U.S. 491, 501 (1975) (internal quotations omitted). Under *Eastland*, therefore, only the most blatant effort of a Congressional committee to inquire into personal affairs that do not implicate matters of legislative policy will be quashed by the federal courts.

Thus, in the absence of a generally available effective judicial remedy, the question we must address is at what stage of the Congressional process is there a "requirement of law" to comply with a Congressional subpoena for purposes of Rule 1.6.

2. **When a Congressional Subcommittee Directs Compliance with a Subpoena and Threatens to Hold a Lawyer in Contempt for Noncompliance, Disclosure Is "Required by Law" as That Term Is Used in D.C. Rule 1.6(d)(2)(A)**

The Congressional subpoena does not, in itself, create the legal requirement that the lawyer disclose confidential information or a client's secrets. Like a subpoena issued by a party in a judicial proceeding or a grand jury subpoena, a Congressional subpoena is not self-executing. As with subpoenas in the judicial or administrative process, objections can be raised, argued and resolved in the legislative process. Negotiations with the subcommittee chairman, members or staff may lead to modifications or even withdrawal of all or part of a Congressional subpoena.

All of the authorities of which we are aware that have addressed this question uniformly suggest that a lawyer has an obligation in the legislative process to raise all available, legitimate objections to a Congressional subpoena for confidential client information. For example, the Restatement (Third) of the Law Governing Lawyers, *supra*, asserts that the lawyer has an obligation in the legislative process to object on all legitimate grounds to such a subpoena: "The scope of the protection afforded by the attorney-client privilege and the work-product immunity may be debatable in various circumstances. Similar issues may arise . . . in supplying evidence to a *legislative committee*, grand jury, or administrative agency. . . . A lawyer generally is required to raise any reasonably tenable objection to another's attempt to obtain confidential client information . . . , unless disclosure would serve the client's interests. . . ." Restatement (Third) of the Law Governing Lawyers: Confidential Client Information § 115 (Proposed Final Draft No. 1, 1996) (emphasis added). Similarly, the American Bar Association's Committee on Ethics and

Professional Responsibility in its Formal Opinion 94-385 (1994) suggests that the requirement to make "every reasonable effort" to quash or limit a subpoena applies in the legislative arena. That opinion stated that "if a governmental agency, or any other entity or person, subpoenas . . . a lawyer's files and records relating to the lawyer's representation of a current or former client, the lawyer has a professional responsibility to seek to limit the subpoena . . . on any legitimate available grounds so as to protect documents that are deemed to be confidential. . . ."

In addition to making all appropriate objections to the Congressional body issuing the subpoena, a lawyer would be well advised to discuss with the client the possibility of a judicial action by the client against the lawyer to prevent compliance with the Congressional subpoena. While, as noted, courts will generally not enjoin members of Congress or their staffs from issuing or seeking to enforce a legislative subpoena, it is an open question whether an action might lie against a third party such as a lawyer or a law firm to enjoin compliance with a Congressional subpoena. *See Eastland* at 516 (Marshall, J., concurring) ("The Speech or Debate Clause cannot be used to avoid a meaningful review of Constitutional objections to a subpoena simply because the subpoena is served on a third party. Our prior cases arising under the Speech or Debate Clause indicate that only a member of Congress or his aide may not be called upon to defend a subpoena against Constitutional objection, and not that the objection will not be heard at all."). In *United States v. AT&T*, 567 F.2d 121 (D.C. Cir. 1977), the court upheld an action by the Department of Justice to enjoin AT&T from complying with a Congressional subpoena to provide telephone records that, according to the Executive Branch, implicated national security. *See also* Grabow, *Congressional Investigations* § 3.2[c] at 85 and n.31 (1988).

To prevent any possible appearance of collusion or other impropriety, it may well be prudent for the lawyer to suggest to the client that the client seeks separate counsel regarding such a possible course of action and to be advised of the prospects of such an option by counsel other than the subpoenaed lawyer.[4]

Once the process of objections, negotiations and a ruling by the Congressional subcommittee has been exhausted, and assuming the absence of any judicial intervention, the subcommittee may demand that certain enumerated documents be produced under pain of contempt. At that point, there is effectively no further recourse available to the subpoenaed lawyer. Based on our understanding of Congressional procedures, judicial precedents enforcing the criminal contempt of Congress' statutory provisions and analyses by recognized experts, we conclude that the point at which the lawyer becomes "required by law" to disclose any client confidences is the point at

which the Congressional subcommittee specifically directs compliance with the subpoena and threatens to use its statutory authority, 2 U.S.C. § 192, providing criminal sanctions for contempt of Congress.

Current Congressional rules expressly permit any subcommittee of a House Committee to hold hearings and "to require by subpoena or otherwise, the attendance and testimony of such witnesses and the production of . . . documents as it considers necessary." Rules of the House of Representatives, 106th Cong., 1st Sess., Rule XI, cl. 2(m)(1)(B) ("House Rules") *reprinted in* 145 Cong. Rec. H6-10 (daily ed. Jan. 6, 1999). Compliance with a subpoena issued by a subcommittee may be enforced as authorized by the House. House Rule XI, cl. 2(m)(2)(B).[5] A contempt of Congress may be prosecuted, following a referral from the House, by the U.S. Attorney pursuant to 2 U.S.C. § 192.[6] Under this statute, contempt may be prosecuted against any individual who willfully failed to comply with a subpoena issued pursuant to the authority of either House or any Committee of the House. Since a subcommittee subpoena is authorized by the Rules of the House, a contempt of Congress may lie against anyone who willfully failed to comply with a subcommittee subpoena. This interpretation is buttressed by the fact that the statute that authorizes certification from the Congress to the U.S. Attorney for prosecuting an alleged contempt to a grand jury specifically includes the willful failure to comply with a subcommittee subpoena. 2 U.S.C. § 194.

As the General Counsel to the Clerk of the House of Representatives noted, "In the Congressional context, the ruling by the Subcommittee chair that the privilege will not be accepted is the legal and functional equivalent [of] a legal requirement or a court order. Failure to answer at that point constitutes a criminal violation. Disclosure at that stage does not violate the Canons of Ethics nor the Bar Code of any jurisdiction." Memorandum Opinion from Steven R. Ross, General Counsel of the Clerk of the House of Representatives to Congressman Stephen J. Solarz (Dec. 11, 1985) *reprinted in* 132 Cong. Rec. 3036, 3038 (1986). Similarly, in a memorandum from the American Law Division to the Office of the Clerk of the House in 1986, the conclusion was reached that where a committee issues a subpoena, " the contempt of Congress is complete when a committee rejects all claims of privilege and demands that a witness respond. The obligation of law attaches at that time." 132 Cong. Rec. 3044, 3047 (1986). In connection with this same matter, New York University Law School ethics professor Stephen Gillers stated that with regard to privileged information "an order to answer a question, coming from a body with legal power to issue the order, imposes a legal duty that overrides the ethical duty." Memorandum from Professor Gillers to Congressman Solarz (February 19,

1986) *reprinted in* 132 Cong. Rec. 3042, 3043 (1986).

At the heart of these conclusions is the recognition that a lawyer may face criminal conviction, imprisonment and fines for refusing at that point in the Congressional process to provide the demanded information. A violation of the contempt of Congress provisions of 2 U.S.C. § 192 carries with it the possibility of imprisonment of up to one year as well as a monetary fine. The Supreme Court has held that a contempt of Congress cannot be cured by the lawyer's later compliance with the subpoena. *Jurney v. MacCracken*, 294 U.S. 125, 148 (1935) ("[w]here the offending act was of a nature to obstruct the legislative process, the fact that the obstruction has since been removed, or that its removal has become impossible, is without legal significance.") As noted, the Supreme Court has also held that when a witness refuses to answer a question in a mistaken, good faith belief that it would violate his rights to be compelled to answer, his mistake of law will be no defense at a trial on the criminal contempt charge. *Yellin v. United States*, 374 U.S. 109, 123 (1963).

Compounding the dilemma faced by the lawyer is the uncertainty of the applicability or force of the attorney-client privilege or work-product immunity in Congressional proceedings. While we have no doubt that the salutary purposes of the attorney-client privilege and work-product doctrine (as recognized by Congress itself in the Federal Rules of Evidence, the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure) would be severely undermined if they were not fully applicable in Congressional proceedings, individual senators and representatives have repeatedly suggested that these privileges may not apply, or not apply with full force, in Congressional hearings. *See, e.g.,* Beard, *Congress vs. The Attorney-Client Privilege: A Full and Frank Discussion*, 35 Am. Crim. L. Rev. 119 (1997); Rich, *The Attorney-Client Privilege in Congressional Investigations*, 88 Colum. L. Rev. 145 (1988). The matter has never been resolved definitively in the courts.[7] An incorrect prediction of the law could result in the imprisonment of a lawyer who was held in contempt of Congress for refusing to produce documents on the ground of the attorney-client privilege.

The cited Supreme Court cases suggest that if a court upholds the view of a subcommittee—either that the attorney-client privilege or the work-product doctrine does not apply in Congressional proceedings or does not cover the subpoenaed documents—the lawyer will have no valid defense and could be ordered to serve a term of imprisonment. Since it is the unanimous ethical view that a lawyer need not stand in contempt, with the risk of imprisonment, to protect privileged confidential or secret information, it follows that the lawyer may comply with the

directive of the subcommittee to produce the required documents without risking a citation for contempt of Congress.

The fact that a lawyer may deem himself or herself "required by law" to produce the documents at the point the subcommittee demands it does not mean that the lawyer must produce the documents at that time. It was noted at the time that the D.C. Rules of Professional Conduct were proposed that Rule 1.6(d)(2) and its commentary "do not advise a lawyer how far the lawyer must go in protecting client information." Analysis of Comments submitted to the District of Columbia Court of Appeals in response to the Court's order of September 1, 1988, Docket No. M-165-88, Proposed Rules of Professional Conduct and related comments, 21 (1989). In reviewing these comments at the request of Chief Judge Rogers, the former chairman of the D.C. Bar Model Rules of Professional Conduct Committee, Robert E. Jordan, III responded, "I suggest that judgments on these points be left to the lawyer who is ordered to disclose. It seems difficult to specify the proper course of action for such a lawyer given a myriad of factual circumstances which may exist." Notwithstanding the authorization granted by Rule 1.6(d)(2)(A), the lawyer retains the discretion to risk being held in contempt and litigate the issue in the courts, based on the totality of the circumstances.

**Conclusion**

At the point that the lawyer has made and pressed every appropriate objection to the Congressional subpoena and has no avenues of appeal available, and in the absence of any judicial order to the contrary, a lawyer faced with a Congressional directive and a threat of contempt of Congress may deem himself or herself "required by law" to comply with the subpoena within the meaning of D.C. Rule 1.6(d)(2)(A). A lawyer has satisfied his or her professional obligation to maintain client confidences once all objections have been made and exhausted and is not required by the Rules to stand in contempt of Congress if the subcommittee overrules the objections.

Inquiry No. 98-6-16
Adopted: February 16, 1999

1. Throughout this opinion, we refer to actions by a Congressional subcommittee since these are the facts with which we are presented. However, the same reasoning and principles would apply to the appropriate response of a lawyer to subpoenas and directives of a Congressional committee, a House of Congress, or the full Congress.
2. The final version of the Restatement (Third) of the Law Governing Lawyers is expected to be published in late 1999 with no substantive changes to § 115.
3. While no appeal is available to the respondent, under current House Rules, a subcommittee needs a full committee vote to support a referral for a contempt prosecution. See House Rule XI, cl. 1(a)(2). If before the full committee votes to uphold the contempt, the lawyer discloses the subpoenaed documents, the full committee may, but need not necessarily, consider the matter moot.
4. The lengths to which the lawyer must go to protect the attorney-client privilege and confidentiality of the client raise the collateral issue of the lawyer's entitlements to fees and expenses from the client for these efforts. While this may be a subject in the first instance for negotiations between the client and lawyer, we note that, as set forth in our prior Opinion 214, the lawyer has obligations to preserve the privilege and confidentiality of client information even if it is evident that the lawyer will not be compensated for those efforts by the client. As we stated in Opinion 214:

> The ethical obligations of lawyers to protect the confidences and secrets of their clients is not a matter of contract between the lawyer and client; the obligation arises because "confidentiality is essential to the role of the lawyer in the administration of justice," Opinion No. 180, and because, under Canon 1, every lawyer has a duty "to assist in maintaining the integrity and competence of the legal profession."

We interpret this to mean that if no agreement on fees and expenses is reached regarding the efforts to protect the confidential information, the lawyer must nevertheless take all ethically required steps to protect the privilege even if not compensated for the services by the client. Whether a suit in quantum meruit for the services rendered in such a situation may succeed under District of Columbia law is a subject on which we express no view.
5. Under current House Rules, after the relevant chairman has ruled against any objections or challenges to a subpoena, the relevant Committee or subcommittee may vote on whether to hold the party in contempt. If the initial contempt was voted by a subcommittee, then the contempt finding will reach the House floor only if the full Committee also votes the witness in contempt. See House Rule XI, cl. 1(a)(2). Under these Rules, if the House is in session, a vote of the full House is required to refer the matter to the U.S. Attorney for prosecution. However, when the House is not in session, the speaker may refer a finding of contempt by the full Committee to the appropriate U.S. attorney.
6. 2 U.S.C. § 194. 2 U.S.C. § 192 provides

> Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

In addition, theoretically, either chamber of Congress may exercise its "self-help" contempt power which involves a trial before the relevant body and confinement upon conviction for as long as the term of the current Congress. Such a confinement is subject to judicial challenge through a writ of habeas corpus. See Grabow, supra, § 3.4[a] at 87. This alternative procedure has not been utilized in modern times.
7. While far beyond the purview of this Committee and while recognizing the complexity of the issue, we believe it would be extremely beneficial to both clients and lawyers throughout the country for Congress to pass legislation clarifying the applicability of the attorney-client and perhaps other privileges in Congressional proceedings. Such legislation could also provide for procedures in which the privilege may be invoked, considered and resolved.